United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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IN THE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES O. FINLEY, SHIRLEY M. FINLEY and CHARLES O. FINLEY & COMPANY, INC.,

Plaintiffs-Appellees,

-against-

PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY and F.O.F. PROPRIETARY FUNDS, LIMITED,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1292(b)

PARVIN/DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY and F.O.F. PROPRIETARY FUNDS, LIMITED,

Petitioners,

-against-

HONORABLE INZER B. WYATT, U.S.D.J.,

Respondent.

Petition for Writ of Mandamus

PLAINTIFFS-APPELLEES' BRIEF

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INTRODUCTION

Appellants, feigning outrage and crying extreme prejudice, appeal from the District Court's order which refused to dismiss this case for failure to prosecute. Appellants in their brief seek to give the impression that the reason for dismissal, including the alleged prejudice, is so clear, that no rational human being could disagree with their argument that this case should be so dismissed. However, at the outset, we would like to note that it apparently did not occur to appellants to move to dismiss until the magistrate, at a pretrial conference, suggested that there might be a basis for such a motion and, even then, it took appellants some time to conclude that they might be able to make an argument that they have been prejudiced by plaintiffs' alleged failure to prosecute.*

*Appellants were notified of the April 3, 1975 pretrial conference called by Magistrate Schreiber by letter dated March 26, 1975. At the pretrial conference the Magistrate noted that plaintiffs were fortunate that a motion to dismiss had not been made, and stated that the case was to be tried some time between May and July. Plaintiffs' counsel at that time raised no objection to an immediate trial and did not request further discovery. However, when counsel for one of the defendants, F.O.F. Proprietary Funds, Limited ("FOF"), pressed the Magistrate for discovery, the Magistrate ruled that all parties would be permitted discovery on a limited and expedited basis and directed that an order for such discovery, in accordance with the schedule outlined at the conference, be submitted by counsel for FOF. It was only after this conference that counsel for defendants Parvin/Dohrmann, Coleman and Scott, notified the Magistrate that defendants had decided to move to dismiss. The motion to dismiss was not served until April 29, 1975 and was made returnable on May 2, 1975. At that time, the case was set for trial for May 6, 1975 and plaintiffs were ready to proceed.

Also, preliminarily, we would like to note that there has been no showing that this case could or would have been tried between mid-1972 and the present time even had plaintiffs' counsel harassed the District Judges to whom their case was assigned as suggested by defendants' counsel, a procedure which Judge Wyatt did not think would have been appropriate or productive (A-117).*

Plaintiffs respectfully suggest that Judge Wyatt properly decided that the only real relevant factor to be considered in determining defendants' motion was the adoption of the Individual Assignment and Calendar Rules for the Southern District and the omission of any rule requiring the filing of a statement of readiness for trial which have the practical effect of permitting the District Judge to whom a case is assigned to control its disposition from filing to adjudication. Under those circumstances, Judge Wyatt held that traditional considerations relevant to a motion under Rule 41(b) deserve little, if any, weight. We submit that in any event a consideration of those factors requires the denial of the instant motion.

*The records of this Court indicate that the case was first assigned to Judge Gagliardi and then to Judge Stewart prior to it being reassigned to Judge Wyatt, pursuant to the District Court's present program for the disposition of old cases.

ISSUES PRESENTED

1. Did the District Court, in the exercise of its sound discretion, err in refusing to dismiss this case for failure to prosecute where (i) it is undisputed that in the period of approximately three years of inactivity which followed plaintiffs' discovery attempts, this case was never called for conference or trial by the District Judges to whom it was assigned; (ii) there was no procedure in existence pursuant to which plaintiffs could have requested that the matter be set down for trial; (iii) the District Court concluded that plaintiffs could not have obtained a trial in this complex securities litigation during that three-year period; and (iv) when called, plaintiffs were ready to proceed to trial and raised no objection to an immediate trial?

2. Should a case such as this be dismissed for failure to prosecute where plaintiffs have proffered legally recognized reasons and explanations for any inactivity and where defendants have failed to make any credible showing of prejudice?

STATEMENT OF THE CASE

THE COMPLAINT

The complaint herein (A-11 - A-50) alleges violations by defendants of Section 5 of the Securities Act of 1933 and Sections 9 and 10 of the Securities Exchange Act of 1934 in connection with the purchase by plaintiffs of 37,000 shares of Parvin-Dohrmann Company ("Parvin/Dohrmann") stock in March and April of 1969 for a total price of approximately $3,400,000. At that time, defendants Coleman and Scott were the chief executive officers of Parvin/Dohrmann and Coleman, by reason of a transaction in January of 1969 by which he and a group of associates purchased over 25% of Parvin/Dohrmann stock, clearly "controlled" Parvin/Dohrmann. Defendant Jesup & Lamont is a brokerage firm which is alleged to have participated in the wrongdoing through Dunphy, one of its partners. Defendant F.O.F. Proprietary Funds, Limited ("FOF"), one of the funds within the IOS complex of Funds, sold plaintiff Finley 30,000 shares of unregistered Parvin/Dohrmann stock in April of 1969, a transaction in which all of the defendants are alleged to have participated and which is alleged to have constituted a violation of Section 5 of the Securities Act of 1933.

Briefly, it is alleged that in early 1969, when plaintiffs purchased their Parvin/Dohrmann stock, defendants were manipulating the market in Parvin/Dohrmann stock. During

the period between approximately October of 1968 and April of 1969 the price of Parvin/Dohrmann stock had risen from approximately $35 per share to over $125 per share. As part of the manipulation scheme it is alleged that defendant Coleman purchased approximately 50,000 shares of Parvin/Dohrmann stock on the open market between December of 1968 and the end of March, 1969 (in addition to 300,000 unregistered shares of Parvin/Dohrmann stock he and members of a control group, including F.O.F., had purchased in January of 1969) and it will be shown at trial that these transactions were effected at such times and in such a manner as to have the greatest impact on the market price of the stock. In addition, it is alleged that defendants Coleman, Scott, Jesup & Lamont and Dunphy enticed large institutional investors to purchase large quantities of Parvin/Dohrmann stock by supplying them with non public information concerning Parvin/Dohrmann. It will be shown at trial that the effect of these transactions was to dry up the supply of Parvin/Dohrmann stock thus driving up the price in response to the tremendous demand for the stock created by defendants' wrongdoing.

As noted above, the Section 5 violation alleged in the complaint involves the sale to plaintiff Finley by F.O.F. of 30,000 shares of unregistered Parvin/Dohrmann stock three months after it had purchased such stock as part of defendant

Coleman's control group.* The 30,000 shares sold to Finley was only part of 81,000 shares sold by F.O.F. at that time, sales which resulted in a profit to F.O.F. of over $5,000,000. According to sworn testimony received by the SEC from defendants Coleman, Scott and Dunphy and others, this transaction was arranged by Dunphy at the request of Coleman and Scott.

All of the underlying facts in supported of the allegations of the complaint are well documented and cannot be seriously disputed. These facts are contained in sworn testimony of the defendants (other than F.O.F.) before the Securities and Exchange Commission as well as testimony before the American Stock Exchange in connection with an extensive investigation into the affairs of Parvin/Dohrmann and the activity of its stock in 1969. This investigation resulted in the commencement of a civil proceeding by the Securities and Exchange Commission in late 1969 against 18 individuals and firms including all of the defendants herein other than F.O.F.

* Although plaintiffs' claim for rescission because of the Section 5 violation might well be moot by reason of plaintiffs' tender of their Parvin/Dohrmann stock in connection with the Agent tender offer, plaintiffs' claim that they were entitled to rescission in 1969 and are thus entitled to damages occasioned by defendants' failure to rescind has not become moot. It is by reason of this failure to rescind that plaintiffs will urge at trial that they are entitled to damages which include the interest paid on the money used to purchase the stock, money which could have been repaid had the transaction been rescinded.

In addition, the transactions involved herein were the subject of other private civil actions and the testimony, pleadings and other documents filed by defendants in those proceedings contain a wealth of material all of which is clearly admissible at the trial of this matter.

In view of the above, the doubts expressed by appellants as to how plaintiffs could possibly be in a position to try this case cannot be taken seriously. Plaintiffs were, on May 6, 1975 (the date originally set by Judge Wyatt for trial), in a position to try this case and so stated (A-108, A-124, A-134). Plaintiffs' document discovery in 1972 resulted in their obtaining copies of the voluminous transcripts of testimony by the defendants herein before the SEC and the American Stock Exchange* as well as voluminous documents gathered by the SEC in the course of its investigation. In addition, plaintiffs have available to them the SEC filings made by defendants Parvin/Dohrmann, Coleman and Scott as well as transcripts of testimony given by defendants Coleman, Dunphy and Jesup & Lamont in another private action arising out of this transaction and the judicial admissions of all defendants contained in other private actions. Also, still apparently living in New York is the person who personally participated in the decision

* Clearly their testimony is admissible at trial as admission of a party. See Rule 801(d)(2) of the Federal Rules of Evidence.

by F.O.F. to purchase the Parvin/Dohrmann stock in January of 1969 and to sell it three months later and whose testimony before the SEC is available to plaintiffs.* Finally, plaintiffs served numerous subpoenas in preparation for the May 6, 1975 trial date including subpoenas on defendants Jesup & Lamont, Dunphy, another former partner of Jesup & Lamont and a person who was responsible for substantial investments in Parvin/Dohrmann by an institutional investor (A-10). Thus, despite defendants' concern, plaintiffs are confident that, with the above evidence, they will have no problem making out their case.

PRIOR PROCEEDINGS

This action was instituted in the United States District Court for the Northern District of Illinois in April of 1970. Shortly thereafter defendants moved to have the case transferred to the Southern District of New York. (A-1) The motion was granted on August 25, 1970. (A-5).

It is important to note that in support of their motion to transfer defendants relied heavily upon the actions then pending in the Southern District of New York. Indeed, defendants Dunphy and Jesup & Lamont urged that this case would "likely be consolidated for discovery and trial with similar suits presently pending in [the Southern District of New York]". Of course, after transfer,

* Under Rule 801(d)(1) of the Federal Rules of Evidence that testimony is admissible at trial as substantive evidence so long as the individual involved testifies at trial and is subject to cross examination.

defendants took no action to consolidate this action with such other actions, all of which have apparently been disposed of, one as recently as February of 1974. It is also noted that the present attorneys for all of the defendants herein (other than F.O.F.) submitted affidavits in connection with the transfer motions detailing to the Court the tremendous amount of work their respective firms had already done in connection with the subject matter of this action — quite inconsistent with their present claims that they have been prejudiced by reason of their apparent failure to previously investigate and document the transactions involved herein. (A-100).

Defendants' motion to transfer was vigorously opposed because, obviously, it was very inconvenient for Mr. Finley who lives and has his office in Illinois to have to prosecute this action in New YOrk. Nevertheless, Judge Hoffman directed that the action be transferred, primarily because he found that documentary evidence and witnesses were more readily available in New York and that there was pending in this Court other litigation arising out of the same transactions. (A-99 - A-100). We respectfully urge that the fact that plaintiffs have been forced to litigate in a forum not of their own choosing deserves much weight and militates against the granting of the instant motion.

Following the entry of Judge Hoffman's transfer order, plaintiffs were confronted with the task of retaining New York counsel. This was handled by plaintiffs' Chicago counsel. In early October, 1971 a Notice of Appearance was filed in the Southern District by plaintiffs present counsel who immediately began a detailed review of material then available together with other material later obtained from the attorneys for defendants Coleman, Scott and Parvin/Dohrmann in response to notices for production of documents which were served on October 4, 1971. (A-100).

Also on October 4, 1971 notices to take the deposition of defendants Parvin/Dohrmann, Coleman and Scott were served. These depositions were adjourned a number of times, first in order to permit time for review of the documents produced by these defendants and then later because, after reviewing the testimony of Messrs. Scott and Coleman before the SEC and the American Stock Exchange, it was thought that depositions might not be necessary in light of this prior testimony. Thus, the depositions of Messrs. Coleman and Scott and Parvin/Dohrmann were never "abandoned" as repeatedly charged by appellants in their brief. Rather the decision was made not to proceed with

the depositions at that time in view of the fact that it was possible that they would be unnecessary.*

* As noted, plaintiffs do not feel that any additional pretrial discovery is necessary. However, appellants make much of the fact that plaintiffs prepared and served deposition and discovery notices following the April 3 pretrial conferences. However, these documents were served in response to Magistrate Schreiber's ruling that all parties would be permitted limited discovery and that notices of same were to be served by April 14, 1975. If defendants were to have discovery, plaintiffs did not at that time want to risk waiving their right to limited discovery by failing to meet the deadline imposed by the Magistrate. Also, additional notices were served on defendants Parvin, Dohrmann, Coleman and Scott only because the Magistrate, when informed of the discovery requests previously served upon these defendants in late 1971, suggested that new notices be served.

POINT I

THE DISTRICT COURT CLEARLY DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION TO DISMISS FOR FAILURE TO PROSECUTE AND THIS COURT SHOULD NOT, THEREFORE, DISTURB THAT DECISION

Although Rule 41(b) of the Federal Rules of Civil Procedure provides that an action may be dismissed for failure to prosecute, it is universally accepted that a motion to so dismiss is addressed to the sound discretion of the trial court. Moreover, in deciding how to exercise that discretion, the trial court has the right and, indeed, the obligation to take into account all relevant facts and circumstances of the case. Allied Air Freight, Inc. v. Pan American World Airways, Inc., 393 F.2d 441 (2d Cir. 1968), cert. denied, 393 U.S. 846 (1968); Edmond v. Moore-McCormack Lines, Inc., 253 F.2d 143 (2d Cir. 1958), cert. denied, 358 U.S. 848 (1958).

Judge Wyatt, in exercising the discretionary power given him under Rule 41(b), took into account all facts he deemed relevant and held that under the circumstances of this case, it would have been inherently unfair to dismiss the action for want of prosecution. A reading of the transcript of the oral argument before Judge Wyatt shows that he considered three factors to be relevant to the determination of the motion: (1) that under the present system in

effect in the District Court, there was nothing plaintiffs could have done to obtain a trial during the period of inactivity (A-113), and that "the reason there hasn't been a trial of this action is not attributable to the plaintiff, it is attributable to the institution" (A-120); (2) defendants did nothing in respect of a motion to dismiss until after the case was called for a pretrial conference (A-118)*; and (3) that plaintiffs wanted a trial and were ready to proceed (A-124).

Clearly, the most important factor in the mind of the District Court was that under the present system in effect in the District Court, plaintiffs could not have obtained a trial. In this regard, we respectfully suggest that a District Judge is in a better position than anyone else to conclude whether or not the system in effect in and the calendar of the District Court would have permitted a trial and his conclusion in this regard should not be lightly discarded. A factor such as this, we suggest, forms the cornerstone for the well accepted rule that a determination of the District Court on a matter of discretion should not be disturbed absent an abuse of that discretion. Tradeways Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir. 1965), cert.

*Indeed, as previously shown (p. 2, supra), defendants were prompted to make their motion by the Magistrate's suggestion at the April 3 pretrial conference that plaintiffs were fortunate that such a motion had not been made and, even then did not serve their motion papers until April 29, 1975.

denied, 382 U.S. 832 (1965); Petnel v. American Tel. & Tel. Co., 434 F.2d 645 (2d Cir. 1970); States Steamship Company v. Phillipine Air Lines, 426 F.2d 803 (9th Cir. 1970).

As will be shown in Point II, infra, not only was Judge Wyatt's decision not an abuse of discretion but, under the facts of the instant case, it would have been an abuse of discretion to dismiss the action.

The District Court concluded that "as a matter of fairness" it could not dismiss this case in that the rules of the District Court do not provide any machinery by which a plaintiff can give notice that he is ready for trial and that the reason there has not been a trial of this action "is attributable to the institution" and not to plaintiffs.

Appellants first argue that Judge Wyatt was wrong in concluding that no mechanism exists whereby a plaintiff in the Southern District of New York can give notice to the Court and the defendants that he is ready for trial. They point to Rule 15 of the local Civil Rules for the Southern and Eastern Districts, which provides that, in absence of a procedural rule in those Districts, recourse may be had to procedures available in New York State courts. Thus, appellants reason that since Rule 3402 of the New York

Civil Practice Law and Rules provides for the filing of a note of issue, plaintiffs could have filed such a note of issue in the instant case. What is curious about appellants' argument is the glaring absence of any reference to CPLR Rule 3216(b)* which requires a defendant to take some affirmative action in demanding the resumption of prosecution before the case can be dismissed for failure to prosecute. The only action any of the defendants took in this case was to make a motion to transfer the case from Illinois to New York when the action was commenced. Having felt that they had apparently accomplished their purpose in making it very inconvenient for plaintiffs to prosecute their action, defendants did nothing, not even when served with plaintiffs' discovery request. If CPLR Rule 3402 is applicable, it would seem that CPLR Rule 3216(b) also applies and, therefore, dismissal of this action is precluded.

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* CPLR Rule 3216(b) provides:

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule [relating to dismissal for failure to prosecute] and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

* * *

(3) The court [or] party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within forty-five days after receipt of such demand, and further stating that the default by the party upon whom such notice is served in complying with such demand within said forty-five day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed.

Appellants also argue that the effect of Judge Wyatt's decision is to write Rule 41(b) off the books. This argument obviously overstates the effect of Judge Wyatt's ruling in that there are clearly still a wide variety of cases which could be dismissed for failure to prosecute. For example, if a plaintiff fails to respond to a call for a pretrial conference or fails to proceed to trial, his action could be dismissed for failure to prosecute. That, however, is not the situation presented here. Plaintiffs attended all pretrial conferences called by the Court, and, when directed to proceed to trial, raised no objection and, indeed, were wholly prepared to go to trial on May 6, 1975, the trial date originally set by the Court. In addition, when the Magistrate, at the request of defendant FOF, decided to permit limited discovery to all sides (a decision that was subsequently retracted when counsel for FOF changed his mind) plaintiffs promptly prepared and served deposition notices and discovery requests.

Plaintiffs' reliance upon S & K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., 58 F.R.D. 4 (E.D. Pa.), aff'd without opinion, 491 F.2d 751 (3rd Cir. 1973), is misplaced in that the facts present in that case are clearly distinguishable from those of the instant case. There, the

action had been pending for approximately 12 years and, unlike the instant case, plaintiffs had clearly abandoned all discovery endeavors. More importantly, however, unlike the instant case, the plaintiff in S & K Airport had offered no justification whatever for the delay in the case. Finally, nothing in the decision in the S & K Airport case indicates that plaintiff there did not have available to him a mechanism such as the filing of a note of issue by which he could indicate his readiness for trial. Since a motion to dismiss for failure to prosecute essentially involves a balancing of the equities and a consideration of all relevant facts, we respectfully suggest that, for the above stated reasons, the S & K Airport case is not at all controlling to the issues presented on this appeal.

In conclusion, we respectfully submit that Judge Wyatt's decision that he could not in fairness dismiss this case, thus depriving a plaintiff, who wanted and was ready for trial, of a trial on the merits, constituted a sound exercise of discretion which should not be disturbed by this Court.

POINT II

A DISMISSAL OF THIS ACTION FOR FAILURE TO PROSECUTE WOULD HAVE CONSTITUTED AN ABUSE OF DISCRETION.

INTRODUCTION

In their brief, appellants seek to present this case as one where Judge Wyatt determined that the case should be dismissed but decided against dismissing solely because of the system in effect in the District Court. In this way, appellants seek to shift to appellees the burden of showing "that Judge Wyatt clearly abused his discretion in finding that the failure to prosecute here warranted dismissal" (Appellants' Brief, p. 27).

Appellees wish to emphasize that Judge Wyatt decided, in exercising his discretion, that the instant action could not in fairness be dismissed. He did not decide that the case should be dismissed as urged by appellants. Indeed, it is clear from a reading of the transcript of the oral argument that Judge Wyatt did not even consider at all relevant the traditional factors usually involved in a motion under Rule 41(b).

Thus, before he even read the affidavit submitted in opposition to defendants' motion*, Judge Wyatt had endorsed his denial of the motion on defendants' motion papers (A-149-A-150). In fact, since Judge Wyatt spent only approximately two minutes reading plaintiffs' 12-page answering affidavit - at the conclu-

*Because of the very short notice received by plaintiffs of defendants' motion, their affidavit in opposition was not delivered to Judge Wyatt until shortly before the argument.

sion of the oral argument and after he had made his decision (A-149 - A-150)—it can hardly be argued that any fair consideration was given to it. Therefore, to the extent that this Court determines that traditional factors such as excusable neglect and prejudice are relevant, we respectfully suggest that these factors should be considered by the Court without regard to Judge Wyatt's "findings" in this regard.

Rule 41(b) of the Federal Rules of Civil Procedure provides that a case may be dismissed for want of prosecution. However, because the policy of the law is to favor the hearing of a litigant's claim upon the merits, it is universally recognized that dismissal is a harsh remedy and should be resorted to only in extreme cases. Marshall v. Sielaff, 492 F.2d 917 (3rd Cir. 1974).

The text of Rule 41(b) does not delineate those extreme cases where an action should be dismissed for failure to prosecute. However, the criteria for judging whether a particular action should be dismissed for lack of prosecution has been stated frequently in many decisions. This body of case law indicates that factors thought to militate against dismissal in numerous decisions are extant in the case at bar.

At one point in their brief (pp. 44-45), appellants string cite a group of cases wherein actions pending for a period of less than five years (the period during which the

instant action has been pending - but not the period of inactivity which is less than three years) were dismissed for failure to prosecute. It must be assumed, therefore, that appellants are taking the position that the mere passage of a certain quantum of time is in itself dispositive of the issue presented herein. Nothing could be further from the truth.

It is settled that the mere happenstance that there has been a certain period of delay does not carry the day on a Rule 41(b) motion. Messenger v. United States, 231 F. 2d 328 (2nd Cir. 1956). The proper inquiry is to initially focus on the reasons for the delay to ascertain if such delay is excusable. (Id. at 331.)

REASONS FOR DELAY

In this action, there are several factors present which courts have found to excuse a delay in prosecution. The first factor is the illness of the plaintiff. In Rankin v. Shayne Brothers, Inc., 280 F. 2d 55 (D.C. Cir. 1960), the Court of Appeals for the District of Columbia was asked to decide whether the district court had abused its discretion in dismissing the action for lack of prosecution. The court held that the lower court had done so because it had not considered the plaintiff's illness during the pendency of the action a very significant factor. The court found that the plaintiff's illness barred the dismissal of the action.

> "We think the court erred in the special circumstances of the case . . . Rankin [Plaintiff] himself was under medical care from October 1956 to February 1959. His illness culminated in his hospitalization for about

> two months starting in November 1958. His condition was evidenced at the hearing on the motion by the certificate of a doctor to the effect that if Rankin had participated in a retrial during the period between October 1956 and February 1959 a severe breakdown might well have resulted." 280 F. 2d at 55-56.

Other courts have also found that a plaintiff's illness excuses the vigorous prosecution of a lawsuit. In Jarva v. United States, 280 F. 2d 892 (9th Cir. 196), the Ninth Circuit reversed the lower court's dismissal of the action for lack of prosecution, holding that it was an abuse of discretion for it not to have found that the plaintiff's hospitalization excused the delay in the case.

> "But for the fact of the illness during the winter and spring of 1958-1959, we would affirm the district court as having properly exercised its discretion. . . . [D]uring the time he (plaintiff) was hospitalized, it would seem grossly unfair to force him to trial during such a period . . . " 280 F. 2d at 894.

The Rankin and Jarva decisions stand squarely for the proposition that the vigorous prosecution of an action is excused during the period of a plaintiff's serious illness. It is precisely a serious illness of the sort found in Rankin and Jarva that explains in good part why the instant action has been pending for a number of years. In August of 1973, Mr. Charles Finley, the plaintiff who controls plaintiff's side of this lawsuit, had a serious heart attack. At the direction of his doctors, he was confined to a very limited schedule for one year and to this date, is under doctors' orders to restrict his activities. In short, Appellees were not as active in this case as they might

have been because of Mr. Finley's recent health problems. Under these circumstances, it would be grossly unjust to dismiss the instant action. Rankin v. Shayne Brothers, Inc., supra., Jarva v. United States, supra.

Second, many decisions have held that a delay in prosecution caused by the inadvertence of plaintiff's counsel is excusable. In Reizakis v. Loy, 490 F. 2d 1132 (4th Cir. 1974), plaintiff appealed from an order dismissing his action because of a failure to prosecute. Plaintiff had brought a diversity action in the Eastern District of Virginia. Plaintiff's non-Virginia lawyers were obligated by a local court rule to associate themselves with a Virginia attorney. Shortly after being retained, Virginia counsel wished to withdraw. Thereupon the case was delayed because of the failure of plaintiff's lead counsel to retain another Virginia attorney. There was a further delay caused by the lead attorney's inadvertent failure to subpoena certain witnesses. The court reversed the lower court's order of dismissal. It observed:

> "But courts interpreting the rule [41(b)] uniformly hold that it cannot be automatically or mechanically applied. Against the power to prevent delays must be weighed the sound public policy of deciding cases on their merits.... Consequently, dismissal 'must be tempered by a careful exercise of judicial discretion.'
> . . . Rightfully, courts are reluctant to punish a client for the behavior of his lawyer . . . . Moreover, Reizakis was not shown to be personally responsible for any of the incidents that delayed the case. While he knew that Watson [former Virginia counsel] wished to withdraw, he not unreasonably expected his principal counsel, Chaconas, to arrange for a local associate to comply with the rules. Furthermore, he apparently knew nothing about the failure to subpoena the doctors." (Citations omitted, emphasis added.) Id. at 1135.

Thus, the Fourth Circuit held that it was reversible error to dismiss an action for want of prosecution where in large part the delay was caused by counsel's inadvertence. Reizakis is not a maverick decision. The reasoning supporting the decision there has been utilized in other circuits as well. See e.g. Edsall v. Penn Central Transportation Co., 479 F. 2d 33 (6th Cir. 1973); Industrial Building Materials, Inc. v. Interchemical Corp., 437 F. 2d 1336 (9th Cir. 1970).

These decisions are particularly relevant to the instant case. Originally this action was commenced in Illinois by Appellees' Chicago counsel. On Appellants' motion, the action was transferred to the Southern District of New York. When the action was transferred to New York, Appellees retained this law firm. Following a detailed review of transcripts and other documents produced pursuant to a notice to produce, New York counsel prepared a lengthy memorandum which outlined information that it needed from Appellees before it could proceed further (A-101). This memorandum was forwarded to Appellees' Chicago counsel. New York counsel communicated with Chicago counsel on a number of occasions and reiterated its need for such information. Chicago counsel, however, did not communicate the request for information to Mr. Finley until this past August (A-101). It is obvious, therefore, that a significant part of the delay in the case is owing to a breakdown in communications between Mr. Finley and his Chicago counsel (A-101). Appellees should not be barred from having their

day in court because of the inadvertance of their counsel. Punishing Appellees in this way would be inexcusable under the rule enunciated by the Reizakis court.

Furthermore, much time was lost in this litigation due to Appellants' efforts to get the action transferred from Illinois to the Southern District of New York. The transference of this action made it very inconvenient for Mr. Finley, who lives and has his office in Illinois. Appellants' act of transferring this action to New York had no purpose other than to delay the action. Appellants, in support of their motion to transfer, relied heavily on the fact that other similar actions were then pending in the Southern District and on their desire for consolidation. Yet, after the action was transferred, Appellants took no action to consolidate this action with such other actions. Thus, Appellants must share the blame that this action has not been prosecuted as vigorously as it might have been. An action is not an appropriate one for dismissal for lack of prosecution where the delay is also caused by defendants.

APPELLANTS' ALLEGED PREJUDICE

It is respectfully submitted that the foregoing amply demonstrates that the delay in the prosecution of this case is excusable. Thus, the question of the actual prejudice suffered by Appellants becomes critical. Appellants' analysis of the role of "prejudice" in the context of a motion to dismiss for failure to prosecute is misleading. In their brief, Appellants attempt to convince this

court that they may rely on a presumption of prejudice because the action has been pending for over five years. Appellants have not read Messenger v. United States, supra., with the requisite care. In Messenger, this court made it abundantly clear that after a plaintiff had shown justifiable delay, the court must consider actual prejudice to the defendant.

> "The operative condition of the rule is lack of due diligence on the part of the plaintiff -- not a showing by the defendant that it will be prejudiced by denial of its motion. It may well be that the latter factor may be considered by the court, especially in cases of moderate or excusable neglect." (Citations omitted, emphasis added.) Id. at P. 331.

The rule enunciated by this Court in Messenger has been consistently followed. See, Jos. Muller Corp. v. S.A. DeGerance, 508 F. 2d 814 (2d Cir. 1974).

Although Appellants advance a number of theories which they contend demonstrate the substantial prejudice they have suffered by reason of the delay in this case, each claim of prejudice has been shown to be baseless.

Initially, it should be noted that nowhere in their brief do Appellants advance any ground for prejudice to the individual defendants (Coleman, Scott and Dunphy) other than the conclusory assertion that over the years "memories have faded." Even if these defendants' memories have faded, in view of their

continuous involvement in related litigation up through at least February of 1974 when a related action was settled on the eve of trial, the voluminous transcripts of their prior testimony before the Securities and Exchange Commission, the American Stock Exchange and in depositions in other actions would supply a wealth of material to refresh their recollections.

Appellants' continued reliance upon the untimely death of Mr. Cowett, a former officer of FOF, as evidence of prejudice, has, we respectfully suggest, been shown to be nothing more than an attempt to distort the facts of this case to fit within appellants' reading of Tradeways, Inc. v. Chrysler Corp., 342 F.2d 350 (2d Cir. 1965), cert. denied, 382 U.S. 832 (1965). It is not disputed that Mr. Cowett had nothing whatever to do with FOF's purchase of 81,000 shares of Parvin/Dohrmann stock in January of 1969 and, indeed, it is clear that the individual most involved in that purchase is within the subpoena power of the Court and has previously testified before the Securities and Exchange Commission. In addition, it is undisputed that Mr. Cowett had nothing to do with the alleged change in circumstances upon which FOF will undoubtedly rely in urging that it was justified in selling the stock three months later at a profit of over $5,000,000. Indeed, the evidence of Mr. Cowett's alleged participation in that sale relied upon by appellants shows beyond question that Mr. Cowett merely was involved in

the decision as to the timing of the sale and not the decision as to whether the sale should take place. (See Appellants' Reply on Petition for Leave to Appeal, pp. 3-4).

More importantly, however, it is not disputed that Mr. Cowett left FOF as far back as 1971 when Robert Vesco gained control of the IOS complex which included FOF. It would, therefore, appear that Mr. Cowett's unavailability as a cooperative and voluntary witness was as much a fact in 1971 as it is today. However, regardless of where Mr. Cowett resided between 1971 and the date of his death,* all of the defendants could have taken his deposition if his testimony were as crucial as defendants would now have this Court believe it is. And, it is significant that in an action wherein Parvin/Dohrmann attacked the purchase and sale of Parvin/Dohrmann stock as a violation of Section 16(b) of the Securities Exchange Act of 1934, none of the parties in that action made any attempt whatever to preserve Mr. Cowett's testimony. Nor was Mr. Cowett one of the many witnesses called by the Securities and Exchange Commission during the course of its investigation in 1969, although, as previously noted, the Securities and Exchange Commission did call witnesses to testify with respect to FOF's purchase and sale of Parvin/Dohrmann stock. In short, we respectfully suggest that the "importance"

*Appellants' own papers concede that Mr. Cowett lived and worked in Geneva (Appellants' Reply, p. 4, fn) and, therefore, he was, even before his death, outside the subpoena power of the District Court.

of Mr. Cowett's testimony, which was not raised by FOF's counsel at the initial pretrial conference on April 3 when he requested discovery, obviously did not become apparent to defendants until they had read and reflected upon this Court's decision in Tradeways.

All of the other cries of prejudice advanced by appellants have been similarly shown to be manufactured out of whole cloth. As to Parvin/Dohrmann, it is urged that it has been prejudiced by reason of the change in personnel since this action was commenced. However, it is undisputed that as a result of the improprieties alleged in the complaint, defendant Coleman, who was the chairman of Parvin/Dohrmann, and Mr. Scott, who was President, resigned their positions in early 1970. Parvin/Dohrmann urges, however, that its house counsel did not depart the scene until 1971, its financial officer until 1972 and its "corporate secretary" until the end of 1974. Even assuming that our contention that "there was a complete change in management [in early 1970]" (A-105) was therefore incorrect, that does not affect the result.

Clearly, defendants Coleman and Scott are the two individuals who were running Parvin/Dohrmann during the relevant period and thus are the Parvin/Dohrmann personnel who have first-hand knowledge of the facts relevant to the events referred to in the complaint herein, facts which would obviously not be within the scope of responsibility of a "corporate secretary".

It is significant that no claim is made that Parvin/Dohrmann's house counsel, financial officer or corporate secretary have knowledge of any relevant facts. Rather, the date of their departure is referred to only in response to the suggestion that all former management left in early 1970. Moreover, since at least two of these individuals left in late 1971 and early 1972, their "unavailability", if indeed that be the case, cannot be attributed to the inactivity in this case between mid-1972 and earlier this year.

In addition to Mr. Cowett's untimely death, FOF also refers to other changes in management over the years and the alleged hostility of former management to present management. However, it cannot be disputed that the hostility of FOF's former management was manifested in 1972 when the Securities and Exchange Commission commenced its action against Robert Vesco. It is likewise indisputable that those connected with FOF in 1969, the period involved herein, had departed the scene in 1971 when Vesco gained control of IOS. Thus, former management's alleged unavailability was as much a fact in 1971 as it is today and cannot be attributed to plaintiffs.

Perhaps most specious is defendant Jesup & Lamont's claim of prejudice. It is undisputed that Jesup & Lamont's counsel, (who also represents defendant Dunphy), has represented

Jesup & Lamont and its former partners in connection with the transactions involved herein from at least early 1970. This included the representation of defendants Jesup & Lamont and John J. Dunphy, as well as William P. Suter in an action in the District Court entitled 20th Century Investors, Inc. v. Jesup & Lamont, et al. (70 Civ. 2597), which was settled in February of 1974. Yet, counsel complaine in his affidavit in support of defendants' motion that defendants Dunphy and William P. Suter are no longer affiliated with the corporate successor of Jesup & Lamont and that Mr. Suter is a non-resident of the State of New York and that he did not know whether Mr. Suter was subject to compulsory process of this Court or would be willing or able to appear voluntarily to testify at trial (A-84). Yet, plaintiffs' counsel, through a call made to Jesup & Lamont on May 1, 1971 was able to ascertain that Mr. Suter was presently employed by Shaw & Co. at 120 Broadway, New York, New York, and was successful in serving Mr. Suter with a subpoena requiring his appearance on May 6, the original trial date (A-108).

Throughout their brief, appellants take the position that they were justified in assuming that this action had been abandoned by plaintiffs. As evidence of this, appellants point to a letter sent to the Court in January of 1974 by new counsel for FOF suggesting that this case be consolidated with another case. Appellants then argue that plaintiffs did not respond to that letter and that this "failure to respond confirmed what counsel in this case had

long before concluded: that plaintiffs had no interest in moving this case to trial" (Appellants' Brief, p. 20). First, we note that appellants do not explain why they suggested consolidation in January of 1974 if they had "long before concluded" that plaintiffs had abandoned this case. Second, this argument assumes that plaintiffs had some duty to respond to the January 1974 letter. Obviously, the Court was not going to permit consolidation absent a formal motion at which time plaintiffs would have had the opportunity to take a position in connection therewith. Finally, with respect to appellants' entire argument that they considered this action to have been abandoned, we merely point out that at no time during the pretrial conference held on April 3 did appellants take this position and, indeed, as previously noted, counsel for FOF at that time requested the opportunity to conduct discovery.

In conclusion, Appellants' arguement that they have suffered actual prejudice as a result of the delay in the prosecution of this action is specious.

Finally, it cannot be seriously disputed that the complaint herein involves serious claims under the Federal Securities Laws. These claims we respectfully suggest should

not be treated lightly in view of the protracted SEC investigation in 1969 and 1970 into the very facts which form the basis for the claims herein and in view of the action commenced by the SEC as a result of that investigation. The obvious merits of this action we respectfully submit deserves some consideration in deciding whether appellees are entitled to a trial on the merits.

POINT III

A WRIT OF MANDAMUS SHOULD NOT ISSUE SINCE MANDAMUS WILL LIE ONLY IF NO OTHER AVENUE OF REVIEW IS AVAILABLE

Appellants urge that mandamus should issue in the instant case. It is hornbook law that a writ of mandamus should issue only if no other method of review is available, and then only under certain extraordinary circumstances. See, generally, 9 Moore's Federal Practice (2nd Ed.), ¶ 110.22[5], p. 267. Where there is a claim that a controlling question of law is involved, it is clear that a Section 1292(b) certificate should be sought before resort is had to mandamus as a method of review. Id. at 267. If the Appellate Court grants leave to appeal under § 1292(b), as it has here, a fortiori, a writ of mandamus is no longer necessary.

The determination in Mohasco Industries, Inc. v. Lydick, 459 F.2d 959 (9th Cir. 1972) illustrates the proposition. In Mohasco Industries, the District Court had vacated an attachment on the ground that the relevant state attachment statute was unconstitutional. Mohasco attempted to appeal the order vacating the attachment to the Circuit Court pursuant to 28 U.S.C. §1291. The motion panel elected to treat the abortive appeal as an application

for a writ of mandamus. The Court of Appeals made the following observation.

> "The motion panel correctly found that the order appealed from was not a final order. The panel did not have before it the district court file, but we now know that the district judge was never asked to certify a question under 28 U.S.C. Section 1292(b) or an interlocutory appeal. We do not know what view the district judge might have taken had such an application been made. Before a writ in the nature of mandamus is issued in a case of this kind, we believe the district judge should be given an opportunity to rule under 28 U.S.C. Section 1292(b)." (Emphasis added.) 459 F.2d at 960.

Therefore, if mandamus is inappropriate until a claimant has exhausted his right to review under Section 1292(b) it would seem that where a claimant obtains such interlocutory review, mandamus should not issue.

In accepting the certification herein, the Court of Appeals found that there was a controlling question of law involved in the instant case. Having obtained an avenue of review, it is redundant to ask this Court to review the question in the context of a petition for a writ of mandamus.

CONCLUSION

The order appealed from should be affirmed and the application for a writ of mendamus should be denied.

Respectfully submitted,

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